Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-306

MILTON EVEREST MITCHELL,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX C

Oral Decision of Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A20 378 726—Buffalo, New York August 6, 1974

In the Matter of)
MILTON EVEREST MITCHELL) IN DEPORTATION PROCEEDINGS
Respondent)

CHARGES: I & N Act—Section 241(a)(2)—Entered without inspection.

APPLICATION: Voluntary Departure

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
Leo E. Ypsilanti, Esquire 225 Broadway New York, New York 10007	Gordon W. Sacks Trial Attorney Buffalo, New York

ORAL DECISION OF THE IMMIGRATION JUDGE AUG. 6, 1974

The respondent is a 38-year-old married male alien, a native and citizen of Trinidad who last entered the United States of Niagara Falls, New York on August 5, 1974 at which time he presented a birth certificate relating to a Mr. Oliver who had been born in the United States and claimed to be a citizen of the United States. He was in fact admitted as a citizen thereof and thereby avoided inspection as an alien by United States Immigration Officers. He was subsequently apprehended and placed under proceedings. It is clear that the charge contained in the Order to Show Cause is sustained and the respondent is deportable as charged.

The respondent applied for the privilege of voluntary departure from the United States in lieu of deportation. He has testified that he has never been arrested or had any difficulties with the police. However, the record indicates that the respondent obtained the birth certificate showing birth in the United States from Oliver approximately three months ago apparently with an idea of using it as an identity paper if necessary and certainly with the idea of using it on his trip to Canada. He went to Canada with a male friend and two female friends and he stated the reason he did not go with his wife was because they had an argument shortly before. The respondent drove to Canada in his 1973 Mercedes car which he states is worth approximately $10,000 on which he has only one year's payments left. They rented two rooms at a hotel in Toronto and he states that the two girls who accompanied him were in and out of those rooms but had no separate quarters. The alleged purpose of the trip to Toronto was to see a Trinidad festival which was taking place in Canada.

Respondent is married to a citizen of the United States, has one child born in this country who is eight years of age. He claims that last year he earned $15,000 as a house painter but also admits that he paid no federal income tax last year and although this matter was mentioned and discussed with an attorney, he had still filed no income tax for 1973.

Upon consideration of all the facts and records I find the respondent does not warrant the relief he has requested as a matter of administrative discretion. The record shows that he clearly planned for this trip to Canada. He planned his fraudulent return to the United States with a birth certificate which did not belong to him. It is highly probable that he committed adultery on his last trip to Toronto and that he has not paid his income tax for 1973. When this is coupled with the possession of a car worth $10,000,

there is certainly room for doubt as to what activities the respondent is engaged in. In any event, the circumstances of this case do not warrant the grant of voluntary departure as the matter of administrative discretion. I wish to note that the respondent has had an application for an immigrant visa under processing by an attorney in New York but had failed to take any action on it, claiming that he did not have sufficient money with which to pursue it. He has indicated that if he was deported he wishes to be sent to Trinidad.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Trinidad on the charge contained in the Order to Show Cause.

IRA FIELDSTEEL
Ira Fieldsteel
Immigration Judge

APPENDIX D

Decision of Board of Immigration Appeals July 28, 1975

BOARD OF IMMIGRATION APPEALS

Washington, D.C. 20530

July 28 1975

File: A20 374 726—Buffalo

In re: MILTON EVEREST MITCHELL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Leo E. Ypsilanti, Esquire
Edward Kroin, Esquire
225 Broadway
New York, New York 10007

ON BEHALF OF I&N SERVICE: Anthony M. DeGaeto
Appellate Trial Attorney

ORAL ARGUMENT: March 19, 1975

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) — entered without inspection

APPLICATION: Reopening of proceedings

This case presents an appeal from a decision of the immigration judge on August 6, 1974, finding the respondent deportable and ordering his deportation to Trinidad, on the charge contained in the Order to Show Cause. He denied the respondent's application for the privilege of voluntary

departure. Reopening of these proceedings will be denied and the appeal will be dismissed.

The respondent is a native and citizen of Trinidad, who entered the United States without inspection at Niagara Falls, New York, in August 1974, upon a false claim of United States citizenship. Deportability has been established by clear, convincing and unequivocal evidence.

The immigration judge, noting that the respondent obtained a birth certificate relating to a Mr. Oliver, approximately 3 months prior to his reentry into the United States from Canada, with a male friend and two female friends, concluded that the respondent had deliberately planned his fraudulent return to this country. Noting also that it was "highly probable" that the respondent committed adultery on his trip to Toronto and also that he had failed to pay his income tax for the year of 1973, the immigration judge further concluded that the circumstances of this case do not warrant the grant of the privilege of voluntary departure as a matter of administrative discretion. On appeal, counsel challenges the immigration judge's decision on the ground that the respondent is saved from deportation by the provisions of section 241(f) of the Immigration and Nationality Act, as amended, and at the very least, as the husband and the father of United States citizens, he should be granted the privilege of voluntary departure.

We have carefully reviewed the record and find that due to the respondent's intentionally false claim to United States citizenship after his entry from Canada without inspection, he is not entitled to the benefits of section 241(f) of the Act. See *Reid* v. *INS*, —— U.S. ——, 95 S.Ct. 1164 (1975). In the latter case, the Supreme Court held that section 241(f) does not benefit an alien who has entered the United States under a false claim to United States citizenship and was charged with deportability under section 241(a)(2) of the Act. See *Matter of Joquin*, Interm Decision —— (BIA June 11, 1975); *Matter of Munguia*, Interim Decision —— (BIA May 5, 1975). The respondent's deportation, therefore, is not precluded by sec-

tion 241(f) of the Act. Acordingly, termination of these proceedings is not warranted even if, as alleged, the respondent went to Canada for the sole purpose of attending a Caribbean Festival in Toronto.

We further find, in view of the adverse factors set forth in the decision of the immigration judge, that his denial of the respondent's application for the privilege of voluntary departure was correct. Accordingly, the motion to reopen these proceedings will be denied and the decision of the immigration judge will be affirmed.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to reopen these proceeding is denied.

Louisa Wilson
Acting Chairman

APPENDIX E

Petitioner's motion requesting reconsideration of Decision by the Board of Immigration Appeals

U. S. Dept of Justice
Board of Immigration Appeals
Washington, D.C.

File No. A20 374 726

In the Matter of the Appeal of:

MILTON EVEREST MITCHELL,
Respondent.

BRIEF

IN SUPPORT OF MOTION TO RECONSIDER
DISMISSAL OF APPEAL

This is a Motion requesting reconsideration by the Board of its decision and order dated July 28, 1975.

The order and decision of the Board on which reconsideration is requested reads in pertinent part as follows:

> ". . . On appeal, counsel challenges the Immigration judge's decision on the ground that the respondent is saved from deportation by the provisions of section 241(f) of the Immigration and Nationality Act, as amended, and at the very least, as the husband and the father of United States citizens, he should be granted the privilege of voluntary departure.
>
> We have carefully reviewed the record and find that due to the respondent's intentionally false claim to United States citizenship after his entry from Canada without inspection, he is not entitled to the benefits of

section 241(f) of the Act. See *Reid* v. *INS*, U.S., 95 S.Ct. 1164 (1975). In the latter case, the Supreme Court held that section 241(f) does not benefit an alien who has entered the United States under a false claim to United States citizenship and was charged with deportability under section 241(a)(2) of the Act. . . ."

Reconsideration is requested because the Board's decision appears to indicate that consideration was given only to the original grounds challenging the Immigration Judge's decision, namely,

(a) the applicability of Section 241(f) on the case law as existed prior to the Supreme Court's decision in Reid vs. INS; and

(b) the granting of the privilege of voluntary departure.

The Board's decision of July 28, 1975 does not appear to indicate that due consideration was given to the later and distinctly separate challenge of the very validity of the sustaining of the charge of deportation itself that was found in "Point I-A" of the respondent's supplemental brief dated April 8, 1975.

That other part of the decision of the Board which asserts that "deportability was established by clear, convincing and unequivocal evidence" does not appear to address itself to the fundamental issues raised by respondent's counsel, with respect to the request found in "Point I-A" of the supplemental brief dated April 8, 1975.

Respondent's counsel had included an additional reason why OPENING OF THE PROCEEDINGS was warranted, which, even though related to the question of 241(f) benefits, was also an *independent* and *separate* ground upon which termination of proceedings could have been requested at a reopened hearing.

Respondent's counsel had indicated, in essence, that even though the respondent's deportability may have been established, at the deportation hearing, by the clear, convincing and unequivocal evidence adduced from the respondent's admissions at his deportation hearing where he was unrepresented by counsel, information relating to the fact that respondent had been under constant surveillance by the Border Patrol Agent, Cipolini, would cast some doubt on the following questions:

1) Did the survelliance of the respondent begin before entry, when his citizenship claim was doubted, and continue up to the point of arrest?

2) If this was established at a reopened hearing through the testimony of the respondent and the Border Patrol Agent, did such surveillance affect the question of whether his entry was actually without inspection, AS THAT TERM IS USED IN THE CASE LAW CONSTRUING ENTRY ON FALSE CLAIMS OF CITIZENSHIP, AS ENTRY WITHOUT INSPECTION, FOR DEPORTATION PURPOSES, UNDER SECTION 241(a)(2) OF THE ACT.

3) Whether the Immigration Judge could, at a reopened hearing, upon such evidence additional to the prior admissions *alone* of the respondent, entertain a Motion for termination of proceedings on the ground that what had previously been clear, convincing and unequivocal evidence of deportability at the original deportation hearing might now, in the light of the additional information, be substantially less than a clear, convincing and unequivocal standard for sustaining deportability.

Respondent's counsel had felt that the Border Patrol Agent's affidavit submitted as additional evidence would have constituted new evidence for the purpose of reopening for the additional reason of applying for termination on the grounds that deportability was not established.

In the event that the affidavit of the Border Patrol Agent was not considered sufficient by the Board for the purpose

mentioned above, there is presented at this time two affidavits, one by the respondent himself, and another by one of the passengers in his car, containing information which, it was intended, would be submitted as oral evidence in the open forum of a reopened hearing.

These affidavits indicate the strong possibility that because the respondent had appeared for entry into the United States in a Canadian taxicab without luggage after a three-day stay in Canada, this had prompted the suspicion of the Border Patrol and Immigration inspectors, as was indicated by the officers' questioning him intently for at least half an hour concerning the birth certificate and his identity.

The information in these affidavits also indicates that because the officers knew that he was destined to rendezvous with someone else within the inspection area since he had no luggage or means of transport to New York City, they had permitted him to enter the United States, even though they had such serious doubts about his identity and U. S. citizenship; and it is highly probable that they had permitted him to enter for surveillance as to what he was really up to.

Respondent's counsel strongly urges the Board to especially consider this additional reason for reopening proceedings as one which goes to the very fundamental question of whether or not the earlier sustaining of deportabiilty by clear, convincing and equivocal evidence adduced from the respondent's *admissions alone* at the deportation hearing would meet the same test of clear, convincing and unequivocal evidence if the allegations of the respondent's surveillance are established during a reopened hearing.

Respondent's counsel strongly urges the Board to especially consider the fact that the respondent had not presented any of the evidence of his surveillance at the original deportation hearing, and would respectfully redirect the

attention of the Board to the transcript of the respondent's testimony, without the assistance of counsel, at the original deportation hearing.

On page 2, lines 1 through 18, of the transcript of hearing, respondent had answered "yes" to a series of questions put to him by the Immigration Judge, which answers, without the assistance of counsel, constituted his not only making admissions of fact, but also his drawing conclusions of law that were very technical and complex.

It is noted that respondent, without the assistance of counsel, could not, and did not, introduce any evidence concerning the details of his surveillance, entry and alleged lack of inspection; and such evidence would have been a valid defense against deportability.

See Matter of C-V Adm. Dec. Vol. I at page 387.

> ". . . These two cases cited above, we feel, set forth the proper line of demarcation when the charge under consideration is supported and when not supported To summarize, the charge should be used only in those situations in which the inspection contemplated by the Immigration Act of 1917 could not have been held because of the acceptance by the Immigrant Inspector of the applicant's false claims to United States citizenship, and the consequent lack of jurisdiction to proceed with the inspection. . . ."

It is noted that the Board was citing the two leading court cases consistently relied upon for construing deportability for entry without inspection on a false claim of citizenship. Ex parte Gouthro, 296 F. 506 and ex parte Saadi, 23 F.2d 334, Affd. 26 F.2d 458, Cert. denied 278 U.S. 616.

Respondent's counsel strongly urges the Board to give the respondent his day in court to interpose a valid defense against his deportability, particularly since, without an

intelligent waiver of counsel, he had proceeded on his own and had not then presented the facts of the doubts about his citizenship status and his continued surveillance which are germane to his charge of deportability.

Reconsideration is also requested of the Board's decision of July 28, 1975 as it pertains to disposing of the respondent's claim for eligibility under Section 241(f) of the Act.

Respondent's counsel had contended that the very decision of the Supreme Court in *Reid vs. INS* 95 S.Ct. 1164 (1975) had raised a very important question of the applicability of Section 241(f) in circumstances where a charge of deportability, for entry without inspection on a false claim of citizenship, is sustained WITH OR WITHOUT THE IMPORTANT ELEMENT OF THE ALIEN'S EXCLUDABILITY FOR FRAUD AT THE TIME OF ENTRY.

Respondent's counsel had further contended that even though the main thrust of the Supreme Court's decision in *Reid vs. INS* supra was to preclude Section 241(f) benefits from aliens charged with deportability, under Section 241(a)(2), for having entered without inspection under a false claim of citizenship, this preclusion exists only if the *sustaining of such deportability was* QUITE INDEPENDENT of the important element of excludability for fraud.

Relying on this provision claimed to be found in the *Reid vs. INS* decision of the Supreme Court, respondent's counsel had, in the supplemental brief dated April 8, 1975, receded from the earlier position taken in the Motion to Reopen dated January 16, 1975 that 241(f) benefits for the respondent were identical to the matter of *Reid vs. INS* then pending before the Supreme Court of the United States.

Respondent's counsel had modified that portion of the Motion to Reopen for applying for Section 241(f) benefits in the following manner:

a) the respondent would only apply for the benefits of Section 241(f) if his earlier application, at such reopened hearing, to terminate the proceedings on the non-sustaining of the deportation charge itself on the grounds cited heretofore, was rejected.

b) that even if respondent should fail, at a reopened hearing, to have deportation proceedings terminated on the grounds that a charge of entry without inspection had not been established, a reopened hearing would also provide a fair opportunity for the respondent to establish that, even though his deportability for entry without inspection might be considered as sustained, there is the additional question to be resolved as to whether such sustaining was quite independently of his excludability for fraud.

c) that because of the difference between the circumstances of his entry and inspection and the entry and inspection in the REID case, the valid possibility exists that the respondent could, at a reopened hearing, establish that any sustaining of his deportability was *not quite independently* of excludability for fraud, and therefore, he is not precluded from the benefits of Section 241(f).

Respondent's counsel strongly urges that the Motion, as subsequently modified, to reopen deportation proceedings is for the purpose of:

1. questioning the validity of the sustaining of the original Order of Deportation, and

2. applying for Section 241(f) benefits on the grounds that, unlike REID, such *sustaining* was not quite independent of the important element of excludability for fraud, EVEN IF the validity of the original order of deportation is upheld.

WHEREFORE, respondent's counsel respectfully requests that since respondent was not represented by counsel at his original deportation hearing, that he be given a fair

opportunity to raise the substantial question of facts and the germaneness of such facts to questions of law discussed above.

Respectfully submitted,

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Dated: New York, N. Y.
August 15, 1975

APPENDIX F

Decision of Board of Immigration Appeals September 18, 1975

(Emblem)

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

Washington, D.C. 20530

Sep 18 1975

File: A20 374 726—Buffalo

In re: MILTON EVEREST MITCHELL

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Leo E. Ypsilanti, Esq.
225 Broadway
New York, New York 10007

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Entered without inspection

APPLICATION: Motion to reconsider; stay of deportation

In a decision dated July 28, 1975, we dismissed the respondent's appeal from an immigration judge's order of deportation. The respondent has submitted a motion requesting that we reconsider our decision of July 28, 1975. The motion will be denied.

The respondent is a native and citizen of Trinidad who was admitted to the United States upon a wilful false claim to United States citizenship. He made an entry upon being admitted by the immigration officer at the border. Section 101(a)(13), Immigration and Nationality Act; see *Matter of V-Q-*, 9 I&N Dec. 78 (BIA 1960). The

respondent was not then inspected as an alien. See generally *Matter of Wong,* 11 I&N Dec. 712 (BIA 1966). He was therefore correctly found deportable under section 241(a)(2) as an alien who had entered the United States without inspection. *Reid* v. *INS,* 420 U.S. 619, 624-25 (1975). Any surveillance of the respondent due to the suspicious nature of his activities does not alter the fact that he made an entry or that that entry was accomplished without inspection.

We thoroughly discussed the respondents' section 241 (f) claim in our decision of July 28, 1975. The existence of fraud is irrelevant because section 241(f) does not apply to a section 241(a)(2) "entry without inspection" charge. *Reid* v. *INS,* supra.

The respondent has requested a stay of deportation. That request will also be denied.

ORDER: The motion to reconsider and the request for a stay of deportation are denied.

DAVID L. MILHOLLAN
Chairman